man's lien for demurrage charges though it was not stipulated for in the bill of lading.[12]

An interesting example of a statutory demurrage is found in two federal decisions[13] which establish a right in the railroad under the Interstate Commerce Act to charge demurrage on interstate shipments, subject to an ultimate adjudication as to its propriety by the Interstate Commerce Commission. The result is reached by holding that the act compels the shipper to pay promptly the published rate of the railroad, even though it includes a demurrage charge, a payment of less than the published rate exposing him to the penalties of the act for accepting rebates. A protest against the demurrage part of the rate can be addressed only to the Commission under a complaint as to the reasonableness of the whole rate.

THE EFFECT OF UNAVOIDABLE FAILURE OF SUPPLY UPON THE DUTIES OF PUBLIC SERVICE COMPANIES.—Public service companies are commonly said to be under obligation to serve all who apply "with adequate facilities, for reasonable compensation and without discrimination."[1] In ordinary cases, such a statement supplies adequate tests for discovering the duties of public service companies; but cases occasionally arise to which these rules are difficult of application. Such is the case of a natural gas company whose supply of gas is limited.

It has been argued that such a case should be governed by the rules applicable to the failure of a common carrier to furnish cars for an extraordinary demand.[2] The carrier is allowed to supply customers in the order of their application for service, in apparent disregard of the usual rule against discrimination. This condition, however, can only be temporary, because of the rule that the carrier must provide facilities adequate to ordinary demands.[3] To render the cases truly analogous, the gas company must be held to a similar duty of purchasing new gas fields. It is believed that the courts would not recognize such a duty.[4] Public service companies owe duties because of the nature of the function which they have undertaken.[5] The scope of those duties must, in some degree at least, be determined by the extent of their public profession, or undertaking to serve the public.[6] The nature of the business must also be considered.[7] Accordingly, a natural gas company would seem to undertake to supply gas only from its fields, which must be known, in the

[12]New Orleans & N. E. R. R. Co. *v.* George (1903) 82 Miss. 710; Southern Ry. Co. *v.* Lockwood Mfg. Co. (1904) 142 Ala. 322; Pittsburg C. C. & St. Louis R. R. Co. *v.* Moar Lumber Co. (1905) 27 Ohio C. C. 588. *Contra,* Crommelin *v.* N. Y. & Harlem R. R. Co. (N. Y. 1868) 1 Abb. App. 472; Nicolette Lumber Co. *v.* Peoples' Coal Co., *supra.*

[13]Central R. R. Co. of N. J. *v.* Hite (1909) 166 Fed. 976; Texas & Pacific Ry. Co. *v.* Abilene Cotton Oil Co. (1907) 204 U. S. 436.

[1]Beale & Wyman, Railroad Rate Regulation § 55.

[2]15 Harv. Law Rev. 571.

[3]Beale & Wyman, Railroad Rate Regulation §§ 262-265.

[4]No case, however, has been found decisive of this question. In State *ex rel v.* Consumers Gas Trust Co. (1901) 157 Ind. 345, it is expressly stated that this question is not involved.

[5]6 COLUMBIA LAW REVIEW 259.

[6]Elkins *v.* Boston & M. R. R. Co. (1851) 23 N. H. 275, 285; Citizens' Bank *v.* Nantucket Steamboat Co. (U. S. 1811) 2 Story 16; Johnson *v.* Midland Ry. Co. (1849) 4 Ex. 367, 371.

[7]Hutchinson, Carriers (3 ed.) § 90.

nature of things, to be liable to exhaustion. Its duty would not extend to the purchase of new gas fields.[8]

There remains, then, to consider the rules applicable to the distribution of a limited supply. In Indiana, it has been held that a gas company is not justified in refusing to serve a newcomer on the ground that such service would render inadequate the supply to those already under contract with the company, the ordinary rule against discrimination being applied.[9] A similar result has recently been reached in a Pennsylvania case, *Fairchance Window Glass Co.* v. *Star Gas Co.* (1909) 66 Leg. Int. No. 29, where a contract by a gas company to supply one consumer with all the gas it should require was held void, because its fulfillment would prevent the service of other consumers. These are believed to be the only decisions upon the point. In the Indiana case, the court laid stress upon the fact that the company had received the right of eminent domain. But the right of eminent domain is granted in the public interest;[10] and its exercise is allowed to public service companies because of their duty to serve the community. The nature and scope of that duty must be determined upon principles of common law or statute; and do not depend upon the existence of the right of eminent domain. The effect of the decision as a precedent is further weakened by the court's statement that there was no complaint by the consumers, the decision in a suit to which the consumers should be parties being left to inference.

The Pennsylvania case was based largely upon the terms of a statute, under which the company was organized. In neither case was there any discussion of the applicability of the common law rule against discrimination to the peculiar case under consideration. The reason for governmental regulation of public service companies is the public interest.[11] A rule should therefore be considered sound according as it subserves the public interest. It is conceived that the application of the rule against discrimination might result, in an extreme case, in an inadequacy of supply to all consumers, such that industrial and commercial activity, and the resultant prosperity of the community would be seriously threatened, without corresponding advantage to anyone.[12] Similarly, a limited supply of gas might be so dissipated among private consumers that no one would be properly supplied. In such cases, the application of the rule against discrimination would obviously not subserve any public interest. Any other rule, however,

[8]It is true that railroad companies have been compelled to condemn land in the performance of a public duty, Wisconsin etc. Ry. Co. *v.* Jacobson (1900) 179 U. S. 287, 302; Mayor etc. *v.* Norwich & Worcester R. R. Co. (1871) 109 Mass. 103, 112, 113; People *ex rel v.* D. & C. R. R. Co. (1874) 58 N. Y. 152, 263; but there is no intimation that they would be compelled, in the public interest, to build a new branch road, which would be analogous to the requirement that a gas company purchase new fields. Indeed, the contrary is the intimation of Parke, B., in Johnson *v.* Midland Ry. Co., *supra.*

Even if there were such a requirement, it would have obvious limits. Made in the public interest, for example, it would not logically extend to the purchase of fields so situated that the increased supply of gas would not be available to consumers at a price which would make it desirable.

[9]State *ex rel v.* Consumers Gas Trust Co., *supra.*

[10]See Olmstead *v.* Camp (1866) 33 Conn. 532.

[11]6 COLUMBIA LAW REVIEW 259; State *ex rel v.* Dodge City etc. Ry. Co. (1894) 53 Kan. 329; Commonwealth *v.* Fitchburg R. R. Co. (Mass. 1858) 12 Gray 180, 189.

[12]Compare the policy of statutes requiring that in years when the water supply is scarce appropriators shall have precedence according to their priority of residence. Revised Statutes, Arizona, par. 3215, quoted in Slosser *v.* Salt River Valley Canal Co. (1901) 7 Ariz. 376. It is obvious, however, that such an analogy is open to the objections urged against the one discussed above.

would meet with at least equally great objections. In the ordinary case, it would be difficult to determine whether the public interest is better subserved by adequate service of a few or by imperfect service of many consumers. Any rule allowing a natural gas company to prefer one consumer would also open the way to collusion with a favorite customer. It is probable, therefore, that courts will prefer the single, definite test of discrimination to any vague, illusory rule based upon a theoretical advantage to the public.

"NECESSITY" IN THE LAW OF NEGLIGENCE.—That necessity was a well recognized ground at common law for imposing, or relieving from, legal liability is undoubted.[1] An agency was frequently implied on this ground.[2] If self defense,[3] and in some instances, the defense of property,[4] necessitated killing the assailant, or trespasser, the act was not murder; and many trespasses, if impelled by necessity, could be justified.[5] In general, four kinds of necessity find recognition. First, strict necessity, involving the preservation of human life. Second, economic necessity involving property and business interests. Little recognized at common law, this type has grown in favor. Thus it has been included within the necessity justifying violation of Sunday laws,[6] and the retention of property under a contract has been declared not to waive known defects where rejection would have entailed great economic disadvantage.[7] A ship's captain may, without liability, if impelled by necessity, sacrifice his cargo in order to save property on board.[8] Third, necessity of obedience to command.[9] This, it is conceived, narrows down to a case of strict necessity, for the ultimate need of obedience rests ordinarily upon the preservation of life. Fourth, necessity resulting from impaired mental ability instanced by action under sudden peril,[10] and, in some jurisdictions, homicide under impulse uncontrollable by reason of diseased mind.[11]

The application of these principles to the law of negligence is obviously logical. In such cases, however, the courts proceed with caution and seem to recognize strict necessity only. The custodian of a person having an

[1]Cf. the maxims *"Necessitas non habet legem"; "Necessitas vincit legem"* Bouvier Law Dict. Rawles Ed. vol. II p. 364; Egbert *v.* McGuire (N. Y. 1900) 36 Misc. 245; *In re* Briggs (1904) 135 N. C. 118, 126.

[2]McReady *v.* Thorn (1873) 51 N. Y. 454; Ginn *v.* Roberts (1874) L. R. 9 C. P. 331; Pike *v.* Balch (1854) 38 Me. 302. Cf. Terre Haute Etc. Co. *v.* McMurray (1884) 98 Ind. 358; Sevier *v.* Birmingham etc. Co. (1890) 92 Ala. 258; Gwilliam *v.* Twist (1895) L. R. 2 Q. B. D. 84.

[3]Kennedy *v.* Comw. (Ky. 1878) 14 Bush 340; State *v.* Johnson (1876) 75 N. C. 174; Reg. *v.* Dudley (1884) L. R. 14 Q. B. D. 273, 285.

[4]Carroll *v.* State (1853) 23 Ala. 28.

[5]Ploof *v.* Putnam (1908) 81 Vt. 471; Rightmire *v.* Shepard (1891) 12 N. Y. Supp. 800. Cf. Cole *v.* Turner (1704) 6 Mod. 149.

[6]Flagg *v.* Millbury (Mass. 1849) 4 Cush. 243; Morris *v.* State (1869) 31 Ind. 189; Johnson *v.* The People (1891) 42 Ill. App. 594; State *v.* Wilkinson (1877) 59 Ind. 416; Edgerton *v.* State (1871) 67 Ind. 588; Comw. *v.* Knox (1809) 6 Mass. 76; *Contra,* Comw. *v.* Josselyn (1867) 97 Mass. 411; State *v.* Goff (1859) 20 Ark. 289.

[7]Charlie *v.* Pothoff (1903) 118 Wis. 258; Payne *v.* The Lumber Co. (1903) 110 La. 750; Levy *v.* Schwarz (1882) 34 La. Ann. 209; Munro *v.* Butt (1858) 8 El. & B. 738, 753; Fitzgerald *v.* La Port (1894) 64 Ark. 34; Franklin *v.* Schultz (1899) 23 Mont. 165.

[8]Columbia Ins. Co. *v.* Ashley (1839) 13 Pet. 341. See also for other examples of economic necessity Egbert *v.* McGuire, *supra;* People *v.* Siegel (N. Y. 1873) 40 How. Pr. 151.

[9]Thompson *v.* Herman (1879) 47 Wis. 602; Keating *v.* Pacific etc. Co. (1899) 21 Wash. 415.

[10]Coulter *v.* Amer. Etc. Co. (1874) 56 N. Y. 585; Joyce *v.* Boyce (1816) 1 Stark. 493.

[11]Parsons *v.* State (1887) 81 Ala. 577.